No. 16522

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Petitioner,

vs.

HONORABLE JAMES M. CARTER,

Respondent.

BRIEF FOR RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent contends that petitioner should have sought the jurisdiction of this Court pursuant to the provisions of 18 U. S. C. 3731 rather than 28 U. S. C. 1651 for the reasons set forth infra, pp. 9-16.

ARGUMENT

I

THE TRIAL COURT HAD THE POWER UNDER THE YOUTH CORRECTIONS ACT OF 1950, TO SUSPEND DEFENDANTS' SENTENCES AND PLACE THEM ON PROBATION

The issue for the court to determine in this matter is whether or not the Narcotics Control Act of 1956 repealed the Youth Corrections Act of 1950. Respondent contends that the Narcotics Control Act of 1956 did not repeal the Youth Corrections Act of 1950, and Congress neither stated nor did they intend that such Youth Corrections Act be repealed by the Narcotics Control Act of 1956.

The Youth Corrections Act was under study for some ten years prior to its enactment in 1950. As stated in the House Report, the statute is designed to make available for the discretionary use of the federal judges a system for the sentencing and treatment of youth offenders that will promote the rehabilitation of those who show promise of becoming useful citizens and so will avoid the degenerative and needless transformation of many of those persons into habitual criminals. To that end, it provides for a system of analysis, treatment and release that will cure, rather than accentuate the anti-social tendencies that have lead to the commission of crime. This is done by permitting the substitution of correctional rehabilitation for retributive punishment. It marks the departure from the punitive idea of dealing with criminals and looks primarily to the objective idea

of rehabilitation. House Report No. 2979, 81st Congress, 2nd Session, Page 1.

In Cunningham v. United States, 256 F. 2d 467 (5th Cir. 1958), the defendant entered a plea of guilty to theft of a radio of a value of less than $100.00. This was a misdemeanor charge with a maximum imprisonment of one year. The court, however, found that the defendant was a youth offender and committed him to the custody of the Attorney General pursuant to the provisions of the Youth Corrections Act. One year later, the defendant filed a writ of habeas corpus contending that, among other things, he could not be incarcerated for a period longer than the maximum one year provided on a misdemeanor charge. The 5th Circuit, speaking through Chief Judge Hutcheson, denied the writ of habeas corpus on the general grounds that the Youth Corrections Act controlled rather than the specific charge.

Commenting on the case the court quoted statements made by Chief Judge Phillips during hearings before a sub-committee of the Senate Judiciary Committee on a "Correctional System for Youth Offenders", 81st Congress, 1st Session, as follows:

> "As stated in the House Report, the statute (Youth Corrections Act) is designed to make available for the discretionary use of federal judges the system for sentencing and treatment of youth offenders that would promote the rehabilitation of those who show promise of becoming useful citizens and so will avoid the degenerative and needless transformation of many of those persons into habitual criminals... It marks a departure from the punitive idea of

> dealing with criminals and looks to the objective idea of rehabilitation." 156 F. 2d at p. 471.

It is clear that Congress intended to, and in fact did, establish a separate and distinct method and manner of treating those youth who were convicted of offenses between the ages of 18 and 22. In Cunningham v. U.S., supra, the court stated:

> "As pointed out in the government's brief, the Youth Corrections Act applies to convicted persons under the age of 22 years at the time of the conviction and is designed to provide such persons with correctional treatment looking to their complete rehabilitation in lieu of punishment, that is, with preventative guidance and training, and all of its provisions are designed, enacted and enforced with that end in view. (emphasis added). 256 F. 2d at p. 471.

At this point the court's attention is respectfully directed to the government's argument that the Youth Corrections Act does not grant a trial court any new power to grant probation. (Petitioner's Brief, pp. 8-10). The invalidity of the proposition therein asserted is brought into sharp focus by a more extensive reading of the Senate Judiciary Committee's report. A material portion of that report reads as follows:

> "Under its provisions, if the court finds that a youth offender does not need treatment, it may suspend the imposition or execution of sentence and place the youth offender on probation. Thus, the power of the court to grant probation is left undisturbed by the Bill.

> If the court finds that a convicted person is a youth offender and the offense is punishable by imprisonment, it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender for treatment and supervision until discharged by the division, as provided in Section 5017 (c) of the Bill."

The Youth Corrections Act borrows from the Youth Authority statutes in California, Minnesota, Wisconsin, Massachusetts and Texas, and from a model act proposed by the American Law Institute in 1941. In a California case entitled In re Berrera, 23 Cal. 2d 206, at p. 213, the court in commenting on the reasonableness in the classification of those who may be sent to the Youth Authorities, stated:

> "The great value in the treatment of youth offenders lies in its timeliness in striking at the roots of recidivism. Reaching the offender during his formative years, it can be an impressive bulwark against the confirmed criminality that defies rehabilitation, for it is characteristic of youth to be as responsive to good influence as it is susceptible to bad."

The California case and House Report indicate the purposes behind the legislature and the Congress in enacting the Youth Corrections Act. It is clear that they intended to and did in fact make a separate and distinct classification and a separate and distinct manner of handling youth offenders, if in the opinion of the judge sitting on the case, it was to the advantage and benefit of the youth to be given the advantage of measures available under the Youth Corrections Act and the Youth

Authorities Act.

Section 5010 (a) of Title 18 U.S.C., reads as follows:

> "If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence, and place the youth offender on probation."

This section is part of the Youth Corrections Act of 1930. In the case at bar, it is apparent that the government concedes that 18 U.S.C. § 5010 (b) (c) may be used by the court in imposing sentence, but that paragraph (a) of 18 U.S.C. 5010 is not applicable due to the enactment of the Narcotics Control Act of 1956. Respondent respectfully urges that there is no logic or persuasiveness in the government's position that some of the sentencing provisions of the Youth Corrections Act have been repealed by implication while others have not. Respondent contends that in enacting the Youth Corrections Act, additional powers were vested in the court in connection with the type of sentence that might be imposed. This argument is illustrated by the fact that the provisions of the Youth Corrections Are are different from the other provisions in the Code pertaining to punishment.

The Narcotics Control Act of 1956 is silent as to the effect it has upon the Youth Corrections Act. At a glance in the Code it will become evident that when Congress intends to effect some older legislation by new legislation, it makes reference to that fact in the enactment. By way of example, in 26 Sec. 7237 B (a) of the Internal Revenue Code, it is stated, among other things, that the imposition or execution of sentence shall not be

suspended (upon the conviction of designated offense) probation shall not be granted, Section 4202 of Title 18 U.S.C. shall not apply, and etc. Without quoting, but by reference only, 18 U.S.C. § 5026 again specifies the intent of Congress as to whether or not the new enactment shall affect related laws or activities. These are just a few of the examples of legislation or enactments by Congress, wherein they specifically state when other and older enactments shall be affected by new legislation. It is an old axiom of statutory construction that repeals by implication are not favored. Nowhere in the Narcotics Control Act of 1956 does there appear a statement directly or by inference, that Congress intended that the Youth Corrections Act be repealed in part or totally, by the Narcotics Control Act of 1956.

The court's attention is also directed to the fact that Congress, in enacting 18 U.S.C. 4209 (an Act authorizing the use of Youth Corrections Act for those from ages 22-26), expressly stated that that code section would not be applicable to any offense for which there was provided a mandatory penalty, but Congress was silent as to the effect that this section would have upon youths from the ages of 18-22.

By way of illustration of the additional features available under 18 U.S.C. 5010 (a), a youth of 19 convicted of a violation of the Dyer Act, can be granted probation or can be committed for any period that the court might determine up to a maximum of five years. The commitment would be under 18 U.S.C. 2312 and probation would be under 18 U.S.C. § 3651, et seq. This would be the situation prior to 1950. However, since 1950 the court has still another new and different method of sentencing a 19 year old youth convicted under the

Dyer Act. The new method is set forth in the Youth Corrections Act and authorizes the court to place the defendant on probation pursuant to the Youth Corrections Act or commit him pursuant to the same Act. 18 U.S.C. § 5010 (b), et seq. Once a defendant has been found by the court to be a youth offender within the meaning of the Act, then the Youth Corrections Act controls. In the hypothetical example, if the 19 year old defendant is placed on probation under the general probationary sections, and thereafter violates his probation, the court of necessity must impose sentence pursuant to 18 U.S.C. § 2312. However, if the court has held that the 19 year old is a youth offender, and places him on probation pursuant to the Youth Corrections Act, and he thereafter violates his probation, then the court may impose sentence only pursuant to the Youth Corrections Act and may not revert to 18 U.S.C. § 2312. Cunningham v. United States, supra.

Congress must have intended to create a new and different type of probationary sentence when it included same within the Youth Corrections Act, or the reference to probation in the same section would be superfluous. As further indication of congressional intent, the court's attention is respectfully directed to 18 U.S.C. 5023, which states:

> "Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place the youth offender on probation or be construed in any wise to amend, repeal or affect the provisions of chapter 231 of this Title; (Probation)."

It would appear that this means that the court, under appropriate circumstances, could place a 19 year old defendant under probation pursuant to the general probationary sections or the Youth Corrections Act, whichever appeared to be more appropriate.

Congress could have specifically stated that the Youth Corrections Act was not subject to an offense where there was a mandatory penalty. This they have not done. Accordingly, it is respectfully submitted that Congress did not intend to, and in fact did not, repeal the effect and operation of the Youth Corrections Act in any manner by the enactment of the Narcotics Control Act of 1956.

II

THE PETITION FOR WRIT OF MANDAMUS SHOULD BE DENIED BECAUSE THE GOVERNMENT, BY FAILING TO APPEAL WITHIN THE STATUTORY THIRTY-DAY PERIOD, DID NOT AVAIL ITSELF OF THE REMEDY PROVIDED BY LAW AND THEREFORE HAS NO STANDING TO APPLY FOR AN EXTRAORDINARY WRIT.

Traditionally, the prosecution has never had the right to appeal in a criminal case. This is still the law in the federal courts today, except where it has been expressly modified by statute. Section 3731 of Title 18 of the United States Code, which was first enacted in 1907, and has been the law since that time with only minor changes, provides:

"Appeal by United States. An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district court to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken, pursuant to this section, to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

In the case at bar, the trial court granted defendant Feaux's motion and ordered that her sentence be suspended and that she be placed on probation. That such an order is appealable by the government because it has the effect of arresting the judgment of conviction, is established by the decisions of the lower federal courts and of the Supreme Court.

In United States vs. Albrecht, 25 F. 2d 93 (7th Cir. 1928), the trial court made an order placing the defendants on probation after they had commenced serving their sentences. The government sued out a writ of error to the court of appeals. That court held that it had jurisdiction to entertain a writ of error at the

instance of the United States government in such a case. The same result was reached in United States v. Murrey, 19 F. 2d 826 (5th Cir. 1927), aff'd 275 U. S. 347 (1928).

It should be pointed out that at the time the Albrecht case was heard, the phrase "writ of error" was used in place of its synonym, "appeal". The change in terminology was effected by Sections 861(a) and 861(b) of Title 28, U. S. C.

These sections were omitted from the 1948 revision of the U. S. C., undoubtedly because the word "appeal" had come to be used in all instances instead of the now outmoded phrase, "writ of error". However, the substance of Section 861(b) was allowed to remain on the books and reads as follows:

> "All acts of Congress referring to 'writs of error' shall be construed as amended to the extent necessary to substitute 'appeal' for 'writ of error.' "
> Act of June 25, 1948, c. 646, Sec. 23; Stat. 990, Public Laws 773, effective September 1, 1948.

Even so, as late as 1949, a federal court found it necessary to point out that appeal has the same force and effect as its predecessor, the writ of error. Alexander v. United States, 173 F. 2d 865 (9th Cir. 1949).

Thus, it is clear today that the United States government has a right to appeal when it is urged that the trial court lacked jurisdiction to enter an order modifying a defendant's sentence or directing that he be placed on probation.

There are sound reasons why the government's petition for mandamus should be denied. The authorities abound with the statement that mandamus shall not be used as a substitute for appeal. Ex Parte Riddle, 255 U.S. 450 (1921). Matter of Tiffany, 252 U.S. 32 (1920). It follows that when the United States had the statutory right to appeal, and failed to utilize it, they should not now be permitted to obtain a review of the decision of the lower court by seeking a writ of mandamus.

In Ex Parte Riddle, Supra, on petitioner's motion to correct the record, the lower court had ruled that the record need not be corrected to show that, as the result of an agreement between the accused and the District Attorney, the case had been tried before a jury of eleven. Petitioner sought a writ of mandate ordering the trial judge to correct the record. In denying his petition, the court held that inasmuch as the petitioner could have saved the point by exception at the trial or by a bill of exceptions to the denial of his subsequent motion setting forth whatever facts or offers of proof were material, and then brought a writ of error. The court went on to say, "In such cases, mandamus will not lie, at least it is not to be used when another statutory remedy has been provided for reviewing the action below. 255 U.S. at 451 (emphasis added).

Further support for this proposition is found in a case cited by the United States in the case at bar. In Roche v. Evaporated Milk Ass'n., 319 U.S. 21 (1943), the court said, "Appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal." 319 U.S. at 26. It should be pointed out that the United

States specifically contends the trial court lacked jurisdiction. (Petitioner's Brief, P. 38).

As has been pointed out in the case at bar, the United States had an opportunity to appeal the order of the trial court. The authorities support the proposition that the orderly administration of justice demands that a party utilize the remedies provided by law, in the order therein prescribed. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). Instead of appealing when it should have done so, the United States allowed the time for appeal to expire. It is respectfully submitted that by doing so they are not now entitled to a writ of mandate. The policy behind the rule in the field of administrative law that requires a party to exhaust all his administrative remedies before seeking the assistance of the courts, applies with equal force to a matter wholly within the judiciary. When a judgment has been entered, no writ of mandate should issue until the matter has been argued on appeal, absent a showing of urgent circumstances. United States ex rel Conner v. Dist. of Columbia, 61 F. 2d 1015 (D.C. Cir. 1932). In many such instances the appellate court will reverse, thus eliminating the reason for seeking the extraordinary writ, and thereby avoiding the necessity of the higher court having to exercise its discretion. In the instances where the appellate court affirms, the court to which the petition for the writ is directed will have benefit of that opinion and will thereby be better informed as regarding the problem before it.

III

BECAUSE MANDAMUS ISSUES ONLY IN THE SOUND DISCRETION OF THE COURT, THE GOVERNMENT'S PETITION SHOULD BE DENIED UNLESS INJUSTICE OR GREAT INJURY WOULD OTHERWISE RESULT.

Without exception, the authorities hold that the writ of mandamus should be sparingly granted and only when in the sound discretion of the court it is absolutely necessary in order to prevent injustice or great injury. Ex Parte Republic of Peru, 318 U.S. 578 (1942).

If there is a doubt regarding the necessity to issue the writ, it should not be issued. Laycock v. Hidalgo County Water Control & Improvement Dist. No. 12, 142 F. 2d 789 (5th Cir. 1944).

The application of these rules of law to the facts in the case at bar leads to the irrefutable conclusion that it is unnecessary for mandamus to issue. Over one year has elapsed since Robert Emil Austin was placed on probation and nearly four months has elapsed since defendant Feaux was placed on probation pursuant to the Youth Corrections Act, 18 U.S.C. § 5010 (a). During that time, both defendants have altered their attitudes toward life and society and have adopted a healthy outlook toward the future. Both continue making satisfactory adjustments under probationary supervision.

Respondent therefore respectfully urges that, because no injustice or injury will result if the order of the trial court is allowed to stand, and because the

United States failed to exercise its right to appeal or take any action during a reasonable period the government's petition for writ of mandate should be denied.

CONCLUSION

As the Narcotics Control Act of 1956 has not repealed the Youth Corrections Act, Respondent urges that the petition for Writ of Mandamus be denied.

Respectfully submitted,

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